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IN THE

Supreme Court of the United States

No. 79-1292

GEORGE WINSHIP NUNNALLY, III, BARRY KEY NUNNALLY, Individually And As Class Representative For Possible Future Adopted Children, Issue And Descendants, Presently Unknown and Unborn Of The Children Of Jessie McKee Hodgson And For Possible Adopted Descendants Presently Unknown And Unborn Of Margaret McKee Moore,

Petitioners,

v.

TRUST COMPANY BANK, As Co-Trustee Under Part Two Of Item Eight Of The Will Of JESSIE M. MCKEE, Late of Fulton County, Georgia, HUGH MCKEE NUNNALLY, Individually And As Co-Trustee of Part Two of Item Eight Of The Will Of JESSIE M. MCKEE, JESSIE NUNNALLY BRUMBY, CORA NUNNALLY MILLER, MCKEE NUNNALLY, JR., Individually And As Guardian Ad Litem For HUGH MCKEE NUNNALLY, II, SALLY DAY NUNNALLY and ELIZABETH L. O'CALLAGHAN And As Class Representative For Possible Future Natural Born Children, Issue And Descendants, et al., MARTHA NUNNALLY O'CALLAGHAN, JESSIE NUNNALLY BRUMBY, MICAJAH PECK BRUMBY, HUGH MCKEE NUNNALLY, II, (A Minor), SALLY DAY NUNNALLY, (A Minor),

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that a writ of certiorari to review the opinion and judgment of the Supreme Court of Georgia in *Nunnally* v. *Trust Company Bank,* 244 Ga. 697, 261 S.E.2d 621 (1979), be denied.

QUESTION PRESENTED

Whether a state adoption statute, superseded in 1949, that limited the legal effects of an adoption proceeding to the actual parties to the proceeding violates the Equal Protection Clause of the United States Constitution when the statute is used to determine the testamentary intent of a testatrix in a will effective in 1945?

REASONS FOR DENYING THE PETITION

The petition now presented for this Court's consideration fails to fulfill the Court's criteria for review by certiorari, as set out in Rule 19 of the Supreme Court of United States Revised Rules, as amended to February 1, 1979. The petition should be denied because: (1) the question it raises has been previously decided by this Court *not* to present a federal question of substance; (2) the state court decision for which review is sought is in accord with applicable decisions of this Court; and (3) a ruling on the constitutionality of a superseded state statute would not be of general significance.

A. The Petition Seeks Review of a Question Previously Determined by This Court to Lack Federal Substance

In *Fleming* v. *Boston Safe Deposit & Trust Co.,* 409 U.S. 813 (1972), this Court "dismissed for want of a substantial federal question" an appeal raising the

identical constitutional issue now raised by Petitioners under circumstances strikingly similar to those for which review is now sought.

In the *Fleming* case, a Massachusetts adoption statute, "and its predecessors, as it (and they) read before [a] 1958 amendment, was applied with uniformity to prevent a child, adopted by someone not the testator or settlor, from taking as 'issue' [or 'child'] an interest under a trust instrument." *Boston Safe Deposit & Trust Co.* v. *Fleming,* 361 Mass. 172, 279 N.E.2d 342 (1972). It was contended that the superseded statute, as it read prior to its amendment in 1958, denied equal protection of the law to adopted children. As in the case at bar, those who sought to have the Massachusetts statute declared unconstitutional relied upon the rationale of United States Supreme Court cases dealing with classifications based on illegitimacy in intestate succession statutes. 279 N.E.2d at 346 n. 7.

The excluded adopted parties subsequently appealed to the United States Supreme Court the Masachusetts Court's denial of the federal constitutional claim raised in *Fleming.* This Court's dismissal of the appeal constituted a ruling on the merits and a determination by the Supreme Court that the constitutional issue presented therein lacked federal substance.[1] *Hicks* v.

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[1] When *Fleming's* equal protection challenge was continued on appeal to this Court, the constitutional question was argued by the Appellants and the Appellees on grounds of both the reasonableness of the descent and distribution classification of adopted children under the superseded Massachusetts statute *and* the absence of state action in the use of the statute in construction of a will. *See* Appellants' Jurisdictional Statement (No. 71-1482); Appellees' Motion to Dismiss (No. 71-1482). Respondents herein assert that, despite the holding below of the Georgia Supreme Court that state action is involved in the use of the Georgia

Miranda, 422 U.S. 332, 343-345 (1975); *Tully* v. *Griffin, Inc.,* 429 U.S. 68, 74 (1976).

Accordingly, Respondents herein respectfully submit that the petition for certiorari now before the Court should be denied in light of this Court's previous adverse determination of the same constitutional issue in *Fleming* v. *Boston Safe Deposit and Trust Company.*

B. The Unanimous Decision of the Georgia Supreme Court Is in Accord With Applicable Decisions of This Court

This is a will construction case in which the ultimate objective is to determine the intent of the testator. The 1941 Georgia adoption statute is involved only because the Georgia Supreme Court looks to the law in effect at testator's death, in this case 1945, to determine whether the testator intended to include adopted persons in the class of children who take as beneficiaries under the will. *Nunnally* v. *Trust Company Bank,* 244 Ga. 697, 261 S.E.2d 621 (1979).

The applicable decisions of this Court require that Georgia's 1941 adoption statute be upheld as constitutional unless its legislative classifications "bear no rational relationship to a permissible state objective." *Parham* v. *Hughes,* 441 U.S. 347, 351 (1979); *Lalli* v. *Lalli,* 439 U.S. 259, 273 (1978). One legislative objective of the adoption statute at issue in this case was to provide a legal framework for the orderly disposition

adoption statute in a will construction context, *Nunnally* v. *Trust Company Bank,* 244 Ga. 697, 701-02, 261 S.E.2d 621, 624-25 (1979), the constitutional question posed in *Fleming* and herein lacks federal substance on both the grounds of the reasonableness of the classification at issue and the absence of state action.

of property at death. 244 Ga. at 699, 701, 261 S.E.2d at 621, 624. This is an area that this Court has repeatedly recognized as being particularly within the competence and paramount interest of the individual states. *Parham* v. *Hughes,* 441 U.S. 347, 357 (1979); *Lalli* v. *Lalli,* 439 U.S. 259, 268 (1978); *Trimble* v. *Gordon,* 430 U.S. 762, 771 (1977); *Mager* v. *Grima,* 8 How. 490 (1850).

Since the testatrix in this case was not a party to the adoption proceeding, which occurred after the testatrix's death, and since the 1941 adoption statute created no relationship between the testatrix and adopted persons, the Georgia Supreme Court read the statute to presume that the testatrix would intend for her property to pass through her bloodline. Thus, the adoption statute reflected the assessment of the Georgia legislature that in the absence of a contrary expression of intent the natural affinity of decedents favors bloodline succession. This natural preference for bloodline succession is amply supported by Georgia case authority and is recognized in the legislation of virtually every state. *Comer* v. *Comer,* 195 Ga. 79, 23 S.E.2d 420 (1942); Atkinson, *Wills,* 32-33 (2d ed. 1953). Since bloodline succession is one rational means to provide for the orderly disposition of property at death, the Georgia Supreme Court upheld the constitutionality of the 1941 adoption statute as applied.

The Georgia Supreme Court also examined the challenged limitation in the 1941 adoption statute. The provision in question merely stated that, while the rights and obligations of the parties to an adoption proceeding are fixed in those formalized proceedings, "to all other persons the adopted child shall stand as if no such act of adoption had been taken." Ga. L. 1941, p.

300, 305-306. Thus, the legal effects of a Georgia adoption proceeding were statutorily limited in 1941 to the parties to the proceeding: the consenting natural parent(s), the adopting parents, and the adopted child. Strangers to the proceeding, including the relatives of both the adopting and natural parents, were not affected. Under the 1941 statute, an adoption proceeding did not alter any person's bloodline succession pattern, except for the natural parents consenting to the adoption, who lost the right to inherit from the adopted child. *Sears* v. *Minchew,* 212 Ga. 417, 93 S.E.2d 746 (1956); *Alexander* v. *Lamar,* 188 Ga. 273, 3 S.E.2d 656 (1939). The adopted child was deprived of *nothing* under the 1941 adoption statute; rather the adopted child gained an extra inheritance right from its adopting parents, while still retaining its place in the bloodline succession of its natural family. As the Supreme Court of Georgia said in *Alexander* v. *Lamar, supra*:

> "Thus, the statute does not attempt to force the adopted child on others than the adopting parents as an heir, *nor does it deprive the child of its kindred other than its natural parents.* As we have already said, we think that the entire purpose and meaning of the statute was merely to substitute the adopting parents for the natural parents, and to affect the rights of no other person." (Emphasis added). 188 Ga. at 278; 3 S.E.2d at 659.

The primary case relied upon by petitioners, *Trimble* v. *Gordon,* 430 U.S. 762 (1977), is simply not applicable in determining whether the Georgia adoption statute provides a constitutionally permissible guide to the intent of Georgia testators. *Trimble* involved an Illinois statute that effectively excluded illegitimates

from their natural paternal bloodline for purposes of intestate succession. By contrast, the 1941 Georgia adoption statute, which the petitioners now challenge, *did not exclude* adopted children from any inheritance rights through their natural bloodline. Instead, as shown above, the adopted child *gained* an extra inheritance right from its adopting parents while still maintaining its place in the bloodline succession of its natural family. There is nothing in the analysis of *Trimble* v. *Gordon* or any other case decided by this Court which suggests that the Constitution mandates that the states confer even greater benefits upon adopted children.

Petitioners obviously dispute the wisdom of the choices made by the Georgia legislature in the 1941 adoption statute. As the Georgia Supreme Court recognized, however, neither the "wisdom" nor the "abstract fairness" of this state law is at issue in this case. *Nunnally* v. *Trust Company Bank,* 244 Ga. at 701, 261 S.E.2d at 624. This Court has recognized that "it is not the function of a Court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the states]." *Lalli* v. *Lalli,* 439 U.S. at 274. Under our Constitution the wisdom of choices embodied in state legislation is left to the democratic processes of the states. *Parham* v. *Hughes,* 347 U.S. at 351.

C. A Constitutional Ruling With Respect to a Superseded State Statute Is of No General Significance

The Petition now before this Court is of particularized interest to the two named petitioners, but it does not present a legal question of any general signifi-

cance. The democratic processes have continued to work in the Georgia General Assembly, and the statutes determining the legal effect of court adoption proceedings have been amended many times since 1941. *See* Ga. L. 1949, pp. 1157, 1158; Ga. L. 1957, pp. 339, 340; Ga. L. 1961, pp. 219, 220; Ga. L. 1969, pp. 927, 928; Ga. L. 1971, pp. 403, 405-06; Ga. L. 1977, pp. 201, 219, now codified as Ga. Code Ann. § 74-413 (1979) (Cum. Pocket Part).

The provision in the 1941 statute which Petitioners seek to have this Court strike down as unconstitutional has been superseded since 1949. Ga. L. 1949, pp. 1157, 1158. A constitutional ruling by this Court on a superseded Georgia statute would have no general significance for descent and distribution in the future.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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